

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

MAR 16 2016

OFFICE OF
MANAGING DIRECTOR

Dmitriy Lubarsky, CEO
Unipoint Technologies, Inc.
34 Washington Street, Ste. 201
Wellesley, MA 02481

Licensee/Applicant: **Unipoint Technologies, Inc.**
Waiver and Refund Request, Regulatory Fees and
Late Payment Penalty
Disposition: **Denied** (47 U.S.C. § 159(c)(1) and 47
C.F.R. §§ 1.1157, 1.1164, and 1.1166)
Fee and Charges: Fiscal Year (FY) 2014 Regulatory
Fee and Late Fee
Date Request Filed: (*dated* Oct. 1, 2015, *rec'd* Oct.
7, 2015)
Date Regulatory Fee Paid: Apr. 16, 2015
Date Late Penalty Fee Paid: Apr. 16, 2015
Fee Control No.: RROG-15-00016085

Dear Mr. Lubarsky:

This responds to Licensee's *Request*¹ for a waiver of the annual Fiscal Year (FY) 2014 "fees, a penalty on [Licensee's] fees and ... a refund due to extreme financial hardship."² As we discuss in detail below, we deny the *Request* because Licensee failed to establish both good cause shown and that the public interest is served, elements necessary to waive the fees, and either legal grounds or most extraordinary circumstances, elements necessary to waive collection of the penalty and assessed charges of collection.

¹ Letter from Dmitriy Lubarsky, CEO, Unipoint Technologies, Inc., 34 Washington St., Ste 201, Wellesley, MA 02481 to Marlene H. Dortch, Secretary, FCC, Attn: Office of the Managing Director, Regulatory Fee Waiver/Reduction Request, 445 12th St., S.W., Rm TW-B204, Washington, DC 20554 (*dated* Oct. 1, 2015; *rec'd* Oct. 7, 2015) (*Request*). Licensee included the signature page of its Form 120, U.S. Corporate Income Tax Return for 2014. The exhibit does not include the remaining pages of the Form, including the required Schedules, the referenced Statement 1, or other required exhibits, e.g., Forms 1125-A or 1125-E.

² *Id.*

Background

On August 29, 2014, the Commission announced September 23, 2014, as the deadline for paying the FY 2014 annual regulatory fees.³ By that date, the Commission had not received full payment for the regulatory fees due on the subject licenses. Indeed, Licensee's payment for the fees and assessed late payment charges was not received until April 16, 2015.

On October 7, 2015, we received Licensee's *Request* that asserts, "[i]n 2015" it paid the "FY 2013 [(sic) regulatory fee] that was due 9/23/14,"⁴ because it was "under extreme financial difficulty in 2014 and [it] was not able to pay these fees on time."⁵ Specifically, Licensee asserts, "[i]n 2014[, Licensee] had ... negative earnings ... [its] market is shrinking due to new technological offering[s] and presently [Licensee] is operating under extreme financial hardship."⁶ Licensee asks the Commission "to waive [Licensee's] fees, a penalty ... and issue [Licensee] a refund due to extreme financial hardship."⁷ Licensee attached a copy of the "2014 tax return as ... proof of [its] hard financial situation."⁸

Standards

In establishing the regulatory fee program mandated by Congress,⁹ the Commission set out the relevant schedules of the annual fees and the established procedures for, among other matters, payment, waivers, reductions, and deferral, payment, refunds, error claims, and, penalties.¹⁰

Under 47 U.S.C. § 159 and the Commission's implementing rules, we are required to "assess and collect regulatory fees"¹¹ to recover the costs of the Commission's regulatory activities,¹² and when the required payment is received late or it is incomplete, and "not excused by bank error, [to assess] a 25 percent penalty of the amount of the fee ... which [is] not paid in a timely manner."¹³ A timely fee payment is one received at the Commission's lockbox bank by the due date.¹⁴

³ See FY 2014 Regulatory Fees Due No Later Than September 23, 2014, 11:59 PM Eastern Time (ET), *Public Notice*, DA 14-1261 (Aug. 29, 2014).

⁴ *Request*.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ See 47 C.F.R. § 1.1151.

¹⁰ See 47 C.F.R. Part 1, Subpart G.

¹¹ Assessment and Collection of Regulatory Fees for Fiscal Year 2014, *Report and Order and Further Notice of Proposed Rulemaking*, 29 FCC Rcd 10767 (2014) (*2014 Regulatory Fee Order*); Assessment and Collection of Regulatory Fees for Fiscal Year 2011, *Report and Order*, 26 FCC Rcd 10812 (2011) (*2011 Regulatory Fee Order*).

¹² 47 U.S.C. § 159(a)(1); 47 C.F.R. § 1.1151.

¹³ 47 U.S.C. § 159(c)(1); 47 C.F.R. §§ 1.1157(c)(1), 1.1164.

¹⁴ 47 C.F.R. § 1.1164.

The Commission's rule at 47 C.F.R. § 1.1160(a) provides that a refund of regulatory fees will be made upon request, only in the following instances:

(1) When no regulatory fee is required or an excessive fee has been paid. In the case of an overpayment, the refund amount will be based on the applicants', permittees', or licensees' entire submission. * * *

(2) * * *

(3) When a waiver is granted in accordance with §1.1166.

* * *

(d) No refunds will be processed without a written request from the applicant, permittee, licensee or agent.

Under 47 C.F.R. § 1.1166,

The fees ... may be waived, reduced or deferred in specific instances, on a case-by-case basis, where good cause is shown and where waiver, reduction or deferral of the fee would promote the public interest. ... (a) ... All such filings within the scope of the fee rules shall be filed as a separate pleading and clearly marked to the attention of the Managing Director. Any such request that is not filed as a separate pleading will not be considered by the Commission. ... (2) If no fee payment is submitted, the request should be filed with the Commission's Secretary.

The crux of the Commission's rule at §1.1160 to request refund of a regulatory fee is that the applicant must demonstrate either that an excessive fee has been paid or that the fee should be waived or reduced. As to the latter basis, in certain instances, payment of a regulatory fee may be waived, reduced, or deferred upon a showing of *good cause*¹⁵ and a finding that the *public interest will be served thereby*.¹⁶ The applicant has the burden of demonstrating relief is warranted,¹⁷ i.e., that special circumstances warrant a deviation from the general rule to collect the regulatory fee, and that the deviation will serve the public interest.¹⁸

Each year, the Commission establishes the final day on which payment must be received before it is considered late, i.e., a deadline after which the Commission must assess charges that include the statutory late payment penalty required by 47 U.S.C. § 159(c)(1) and 47 C.F.R. §§ 1.1157(c)(1) and 1.1164, and additional charges of interest, penalties, and charges of collection required by 31 U.S.C. § 3717 and 47 C.F.R. § 1.1940. September 23, 2014, was the deadline for

¹⁵ 47 C.F.R. § 1.3.

¹⁶ 47 U.S.C. § 159(d); 47 C.F.R. § 1.1166 ("The fees ... may be waived, reduced or deferred in specific instances, on a case-by-case basis, where good cause is shown and where waiver, reduction or deferral of the fee would promote the public interest."). See also Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, *Report and Order*, 9 FCC Rcd 5333, 5354 ¶ 65 (1994), *recon. granted in part*, 10 FCC Rcd 12759 (1995) (1994 *Report and Order*); *WALT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*); *Phoenix Broadcasting, Inc. Stations KSWD and KPFN Seward, Alaska, Memorandum Opinion and Order*, 18 FCC Rcd 26464, 26466, ¶ 5 (2003) (*Phoenix Broadcasting, Inc.*).

¹⁷ *Tucson Radio, Inc. v. FCC*, 452 F.2d 1380, 1382 (D.C. Cir. 1971).

¹⁸ *Northeast Cellular*, 897 F.2d at 1166.

paying the FY 2014 annual regulatory fees.¹⁹ The Commission's 2014 *Regulatory Fee Order*, 30 FCC Rcd at 10286, ¶ 50, warned,

To be considered timely, regulatory fee payments must be made received and stamped at the lockbox bank by the payment due date for regulatory fees. Section 9(c) of the Act requires us to impose a late payment penalty of 25 percent of the unpaid amount to be assessed on the first day following the deadline for filing these fees. Failure to pay regulatory fees and/or any late penalty will subject regulatees to sanctions, including those set forth in section 1.1910 of the Commission's rules, which generally requires the Commission to withhold action on "applications, including on a petition for reconsideration or any application for review of a fee determination, or requests for authorization by any entity found to be delinquent in its debt to the Commission" and in the ... (DCIA). We also assess administrative processing charges on delinquent debts to recover additional costs incurred in processing and handling the debt pursuant to the DCIA and section 1.1940(d) of the Commission's rules. These administrative processing charges will be assessed on any delinquent regulatory fee, in addition to the 25 percent late charge penalty. In the case of partial payments (underpayments) of regulatory fees, the payor will be given credit for the amount paid, but if it is later determined that the fee paid is incorrect or not timely paid, then the 25 percent late charge penalty (and other charges and/or sanctions, as appropriate) will be assessed on the portion that is not paid in a timely manner. [Footnotes deleted.]

After the deadline, the full amount of the regulatory fee includes the 25% late payment penalty²⁰ and, if the debt remains unpaid, the balance owed includes the accrued charges of collection, interest, and penalties. If a regulatee tenders less than the full amount owed, it is a partial payment, which is applied to the amount owed as set forth in 47 C.F.R. § 1.1940(f)—first to the penalties and accrued charges, and then to the principal amount owed.²¹ Afterwards, any unpaid portion is a delinquent regulatory fee that incurs interest, penalties, and charges of collection under 31 U.S.C. § 3717 and 47 C.F.R. § 1.1940. Moreover, until the full amount is paid or satisfactory arrangements are made, the licensee remains a delinquent debtor subject to the Commission's administrative sanctions of dismissal as set forth at 47 C.F.R. §§ 1.1164(e)²² and 1.1910.

¹⁹ See FY 2014 Regulatory Fees Due No Later Than September 23, 2014, 11:59 PM Eastern Time (ET), *Public Notice*, DA 14-1261 (Aug. 29, 2014).

²⁰ 47 C.F.R. § 1.1164 ("[a]ny late payment or insufficient payment of a regulatory fee, not excused by bank error, shall subject the regulatee to a 25 percent penalty of the amount of the fee of installment payment which was not paid in a timely manner.").

²¹ 47 C.F.R. §§ 1.1940(f) ("When a debt is paid in partial ... payments, amounts received ... shall be applied first to outstanding penalties and administrative cost charges, second to accrued interest, and third to the outstanding principal."), 1.1157(c)(1), 1.1164(c).

²² 47 C.F.R. §§ 1.1164(e) ("Any pending or subsequently filed application submitted by a party will be dismissed if that party is determined to be delinquent in paying a standard regulatory fee The application may be resubmitted only if accompanied by the required regulatory fee and by any assessed penalty payment."), 1.1910.

An applicant seeking a waiver of the penalty and assessed charges has the burden of demonstrating compelling and "most extraordinary circumstances"²³ that a waiver or deferral would override the public interest, as determined by Congress, that the government should be reimbursed for the Commission's regulatory action.²⁴

Discussion

Licensee's requested relief, refunds of the fees and penalty paid, arises only after first determining whether the fee may be waived, based here on the asserted ground of financial hardship, and then, as a separate matter, whether the statutory penalty may be waived because of a legal excuse or the existence of a most extraordinary circumstance. We first address whether Licensee establishes that the annual regulatory fee should be waived, and next whether Licensee establishes that the statutory penalty should be waived.

Waiver of the Regulatory Fee

In certain instances, payment of a regulatory fee may be waived, reduced, or deferred upon both a showing of good cause²⁵ and a finding that the public interest will be served thereby.²⁶ A mere allegation of financial hardship thus does not automatically entitle a regulatee to a waiver.²⁷

For example, on September 10, 2014, the Commission published Procedures for Filing Waivers, Reductions and Deferments of Regulatory Fees,²⁸ which provided,

Under 47 U.S.C. 159(d) and 47 C.F.R. § 1.1166, the Commission may waive, reduce, or defer payment of a fee in specific instances, on a case-by-case basis, where good cause is shown and where waiver, reduction or deferral of the fee would promote the public interest. Licensees requesting a waiver or reduction must demonstrate both of those required elements, and licensee either must pay the full fee or submit with the request a separate petition to defer payment due to financial hardship that is fully supported by the required documentation of the

²³ *McLeodUSA Telecommunications Services, Inc., Memorandum Opinion and Order*, 19 FCC Rcd 6587, 6589, ¶ 8 (2004) (denying the request for waiver of 25 percent penalty).

²⁴ 47 U.S.C. § 159(d); 47 C.F.R. § 1.1166 ("The fees ... may be waived, reduced or deferred in specific instances, on a case-by-case basis, where good cause is shown and where waiver, reduction or deferral of the fee would promote the public interest."). See also *1994 Report and Order*, 9 FCC Rcd at 5344; *WAIT Radio v. FCC*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

²⁵ 47 C.F.R. § 1.3.

²⁶ 47 U.S.C. § 159(d); 47 C.F.R. § 1.1166 ("The fees ... may be waived, reduced or deferred in specific instances, on a case-by-case basis, where good cause is shown and where waiver, reduction or deferral of the fee would promote the public interest."). See also *1994 Report and Order*, 9 FCC Rcd at 5354 ¶ 65; *WAIT Radio v. FCC*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166; *Phoenix Broadcasting, Inc.*, 18 FCC Rcd at 26466, ¶ 5.

²⁷ *Assessment and Collection of Regulatory Fees for Fiscal Year 2011, Report and Order*, 26 FCC Rcd 10812, 10819, ¶17 (2011).

²⁸ *Procedures for Filing Waivers, Reductions and Deferments of Regulatory Fees*, FCC (Sep. 10, 2014) 2014 WL 4460322 (F.C.C.), *Procedures for Filing Waivers, Reductions and Deferments of Regulatory Fees*, FCC (Sep. 5, 2013) 2013 WL 4773993 (F.C.C.).

financial hardship. If the licensee pays the fee, and the Commission grants the request, the Commission will refund the appropriate amount.

Each licensee has the burden of demonstrating compelling and extraordinary circumstances that a waiver would override the public interest, as determined by Congress, that the government should be reimbursed for the Commission's regulatory action.²⁹ To make a case, the licensee must "fully document its financial position and show that it lacks sufficient funds to pay the regulatory fee and to maintain its service to the public."³⁰ The requirement to fully document its financial position means that the licensee must present "relevant financial documents [to] include the licensee's balance sheet and profit and loss statement (audited, if available), a cash flow projection for the next twelve months (with an explanation of how calculated), a list of the licensee's officers and their individual compensation, together with a list of their highest paid employees, other than officers, and the amount of their compensation, or similar information. On this information, the Commission considers on a case-by-case basis whether the licensee met the standard to show the station lacks sufficient funds to pay the regulatory fee and maintain service to the public."³¹

Licensee's assertion that it is experiencing extreme financial hardship based only on the 2014 tax return does not provide the full financial documentation described above. Moreover, the tax return is incomplete, *e.g.*, it does not include schedules (C, J, K, L, M-1, or M-2), referenced Forms 1125-A and 1125-E, or Statement 1. Moreover, Licensee does not clarify whether fees are collected from end users. Overall, Licensee does not provide sufficient documentation to determine whether it has sufficient funds to pay the regulatory fee and to maintain service to the public. Finally, Licensee fails to establish both *good cause* and that the *public interest is served* in granting the waiver. Hence, we deny the request to waive³² the fee, and because the fee is not waived, we deny the refund request.³³ We turn next to Licensee's request to waive and refund the penalty.

Waiver of the Penalty and Charges of Collection

Each year, the Commission establishes the final day on which payment must be received before it is considered late, *i.e.*, a deadline after which the Commission must assess charges that include the statutory late payment penalty required by 47 U.S.C. § 159(c)(1) and 47 C.F.R. §§ 1.1157(c)(1) and 1.1164, as well as interest, penalties, and charges of collection required by 31 U.S.C. § 3717 and 47 C.F.R. § 1.1940. For FY 2015, September 24, 2015, was the deadline for paying the regulatory fee.³⁴ Licensee did not pay the full amount by the deadline, hence we imposed the statutory penalty. On April 16, 2015, we received Licensee's payment.

²⁹ *Id.*, 1994 Report and Order, 9 FCC Rcd at 5344.

³⁰ *Id.*

³¹ 1994 MO&O, 10 FCC Rcd at 12761-62, ¶ 13.

³² Phoenix Broadcasting, Inc. Stations KSWD and KPFN Seward, Alaska, *Memorandum Opinion and Order*, 18 FCC Rcd 26464, 26446, ¶¶ 5-6 (2003).

³³ 47 C.F.R. § 1.1160(a).

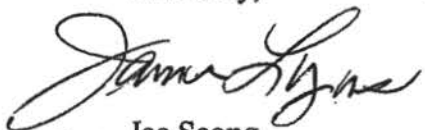
³⁴ See FY 2015 Regulatory Fees Due No Later Than September 24, 2015, 11:59 pm Eastern Time (ET), *Public Notice*, DA 15-1013. (Sep. 11, 2015).

To avoid the imposition of the late payment penalty, before the deadline, Licensee could have followed our procedure at 47 C.F.R. §1.1166 by submitting both a timely and properly supported petition to defer payment along with a timely and properly supported petition to waive the fee. Licensee failed to take that step. Instead, Licensee asserts, because of "extreme financial difficulty in 2014"³⁵ it was unable to pay the fee on time. That does not present either a legal excuse or a particular extraordinary circumstance excusing late payment.

The penalty required by 47 U.S.C. § 159(c)(1) is not limited to situations where the failure to pay was knowing or willful. If it is to be waived, it is "only in the most extraordinary circumstances,"³⁶ which Licensee does not establish. Neither the statute nor the Commission's regulations contemplates a waiver of or reduction in the late payment penalty based on the amount of time after the deadline within which the regulatee satisfies its payment obligations; indeed, the penalty for late payment applies even to situations where the deadline is missed by a short period of time.³⁷ Accordingly, we deny the request to waive the penalty, and thereby deny the request for a refund.

If Licensee has any questions concerning this matter, please call the Revenue & Receivables Operations Group at (202) 418-1995.

Sincerely,



FOR: Jae Seong
Acting Chief Financial Officer

³⁵ Request.

³⁶ NTT America, Inc., *Memorandum Opinion and Order*, 21 FCC Rcd 8088, 8089, ¶ 5 (2006) (Regulatee failed "to establish ... extraordinary circumstances ... problems that led to the untimely payment ... were entirely within [the regulatee's] control and the consequence of its own business decisions."); *McLeodUSA Telecommunications Services, Inc.*, *supra*.

³⁷ See *XO Communications, LLC* (OMD, Nov. 10, 2010).